

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)

Distribution of the)

2010, 2011, 2012, and 2013)
Cable Royalty Funds)

Docket No. 14-CRB-0010-CD (2010-13)

PROGRAM SUPPLIERS' RESPONSIVE BRIEF PURSUANT TO
ORDER SOLICITING FURTHER BRIEFING

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
Mitchell Silberberg & Knupp LLP
1818 N Street NW, 7th Floor
Washington, DC 20036
(202) 355-7917 (Telephone)
(202) 355-7887 (Facsimile)
goo@msk.com
lhp@msk.com
amd@msk.com

*Attorneys for
Program Suppliers*

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PROGRAM SUPPLIERS' RESPONSIVE BRIEF PURSUANT TO ORDER SOLICITING FURTHER BRIEFING

On July 16, 2018, Program Suppliers submitted their initial legal memorandum and supporting declarations from Program Suppliers' witnesses Jeffrey S. Gray, Ph.D. and Howard Horowitz, as required by the Copyright Royalty Judges' ("Judges") June 29, 2018 *Order In 2010-2013 Allocation Proceeding Soliciting Further Briefing* ("June 29 Order"). Program Suppliers now submit their responsive brief contemplated by the June 29 Order, which includes Program Suppliers' "responses to the points made by any or all of the other parties" in their July 16, 2018 submissions.¹

As an initial matter, Program Suppliers note that they concur with the Joint Sports Claimants ("JSC"), the Commercial Television Claimants ("CTV"), the Settling Devotional Claimants ("SDC"), and the Canadian Claimants Group ("CCG") that a litany of past decisions by the Copyright Royalty Tribunal ("CRT"), the Copyright Arbitration Royalty Panel ("CARP"), and the Librarian of Congress ("Librarian") consistently refused to award PTV any adjustment to its Basic Fund royalty award to account for its non-participation in the 3.75% and Syndex Funds.² However, Program Suppliers diverge from these parties (and from the Public Television Claimants ("PTV")) regarding their suggestion that *dicta* in the 1998-99 CARP Report,³ and *factual findings* by the Judges in the 2004-2005 Cable Allocation Phase determination⁴ should be treated as controlling legal precedent, such that the Judges are obligated to award PTV an

¹ June 29 Order at 2.

² See 1998-99 CARP Report at 69 (October 21, 2003) ("1998-99 CARP Report") at 69 (holding that PTV should receive the same share of Basic Fund royalties for the 1998-99 cable royalty years that PTV received in the 1990-92 Cable Distribution proceeding); 61 Fed. Reg. 55653, 5567-68 (October 28, 1996) (rejecting the proposed PTV Basic Fund adjustment); 57 Fed. Reg. 15286, 15300 (April 27, 1992) (same).

³ 1998-99 CARP Report at 26, n.10.

⁴ 75 Fed. Reg. 57063, 57070 (September 17, 2010).

adjustment to its Basic Fund royalty shares if the Judges base their allocation determination for PTV on the Bortz Survey. Program Suppliers disagree that *legal* precedent requires such an adjustment for PTV, even in the context of a PTV royalty share based on the Bortz Survey, or that the evidence presented in this proceeding supports such an adjustment. Program Suppliers also disagree with Ms. McLaughlin's proposed adjustments to the PTV Basic Fund royalty shares presented by Dr. Gray and Mr. Horowitz, which are inconsistent with their testimony, as clarified in the declarations attached to Program Suppliers' initial brief responding to the June 29 Order.⁵

Program Suppliers continue to advocate royalty share awards in this proceeding based on Dr. Gray and Mr. Horowitz's testimony, neither of which require any upward adjustment to be applied to PTV's Basic Fund share to account for its non-participation in the 3.75% and Syndex Funds. Program Suppliers support 3.75% Fund awards in this proceeding which apply a proportionate upward adjustment of all parties' Basic Fund royalty share awards to account for the non-participation of PTV. Moreover, all parties agree that Program Suppliers are the only party remaining in this proceeding entitled to participate in the Syndex Fund, and that 100% of the remaining Syndex Fund royalties should be awarded to Program Suppliers.

I. Neither The 1998-99 CARP Report Or The 2004-2005 Allocation Phase Decision Should Be Considered Legal Precedent Requiring A PTV Basic Fund Share Adjustment.

The Copyright Act requires the Judges to "act on the basis of" prior "determinations and interpretations" by the CRT, the CARP, and the Judges."⁶ However, not every single statement in a prior decision rises to the level of controlling legal precedent. As the Judges have recognized, additional language in an order not necessary to the Judges' ultimate decision should

⁵ See PS Initial Brief, Exhibit A ("Gray Declaration") at 2-5, and Exhibit B ("Horowitz Declaration") at 2-3.

⁶ 17 U.S.C. §803(a)(1).

be considered “dicta,” and is not considered controlling precedent by the Judges in subsequent determinations.⁷ Moreover, factual findings from prior proceedings are not legal precedent. Accordingly, the Judges are not obligated to give the same weight given in prior proceedings to any particular piece of evidence presented in this proceeding.⁸

PTV relies on language from the 1998-99 CARP Report and the 2004-2005 Cable Allocation Determination as “precedent” supporting its requested Basic Fund share adjustment in this proceeding, which it seeks regardless of the methodology ultimately adopted by the Judges.⁹ As Program Suppliers and JSC both pointed out in their initial briefs, the language PTV cites from these determinations is only applicable in the limited situation when PTV’s royalty share allocation is based solely on the Bortz Survey, and does not support a PTV adjustment when any other methodology is applied (in whole, or in part) in order to determine PTV’s royalty share.¹⁰ However, notwithstanding this express limitation, it is clear that neither decision should be considered legal precedent controlling the Judges’ determination in this proceeding.

First, the 1998-99 CARP did not ultimately award PTV its Bortz Survey share, and instead determined to simply award PTV the same royalty share award it received in the 1990-92 Cable Distribution proceeding, without applying *any* adjustments.¹¹ Accordingly, the 1998-99

⁷ See *Order Denying Joint Motion To Strike Multigroup Claimants’ Written Direct Statement And To Dismiss Multigroup Claimants From The Distribution Phase*, Consolidated Docket Nos. 14-CRB-0010-CD/SD (2010-13) at 4 (March 26, 2018).

⁸ *Indep. Producers Grp. v. Librarian Of Congress*, 792 F.3d 132, 143 (D.C. Cir. 2015); *Program Suppliers v. Librarian Of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005); see also Docket No. 2007-3 CRB CD 2004-2005, Oct. 6, 2009 Tr. at 32 (Sledge, C.J.) (“Precedent applies to questions of law. Precedent is never applied to questions of fact.”).

⁹ See PTV Initial Brief at 10-12.

¹⁰ See PS Initial Brief at 2, 5-6; JSC Initial Brief at 7-8.

¹¹ 1998-99 CARP Report at 69 (holding that PTV should receive the same share of Basic Fund royalties for the 1998-99 cable royalty years that PTV received in the 1990-92 Cable Distribution proceeding); see also 69 Fed. Reg. 3606, 3616-17 and 3620 (January 26, 2004); compare 61 Fed. Reg. at 55668.

CARP's footnote discussion regarding the propriety of a PTV Basic Fund share adjustment is merely *dicta*, as it was not necessary to its ultimate royalty allocation decision for PTV in that proceeding. Moreover, Section 803(a)(1) of the Copyright Act states that the Judges are only to "act on the basis" of prior CARP decisions "to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights."¹² To the extent that the 1998-99 CARP Report departed from precedent regarding the PTV Basic Fund adjustment,¹³ it was inconsistent with prior determinations of the Librarian, and should not be considered controlling authority by the Judges.

Second, although the 2004-2005 Cable Distribution Determination did award PTV its Bortz Survey share as adjusted by Ms. McLaughlin, which included an embedded Basic Fund adjustment for PTV, the Judges did not provide any legal analysis supporting their adoption of a Basic Fund adjustment for PTV as a matter of law, or any rationale underlying their decision. Instead, the Judges merely cited to one of the 2004-2005 Cable Allocation Phase Settling Parties' Proposed Findings Of Fact in that proceeding as support for its PTV share calculations.¹⁴

Program Suppliers do not agree that *dicta* from the 1998-99 CARP Report, or the 2004-2005 Cable Distribution Determination's adoption of Settling Parties' proposed factual findings, absent any legal analysis, should be considered controlling *legal* precedent for future cable royalty distribution proceedings. This is especially true where, as here, there is nothing to

¹² 17 U.S.C. § 803(a)(1).

¹³ See 1998-99 CARP Report at 26, n.10.

¹⁴ See 75 Fed. Reg. at 57070 (citing Settling Parties' Proposed Finding Of Fact ¶ 317). Program Suppliers note that JSC attached to their Initial Brief a declaration from attorney Michael Kientzle ("Kientzle Declaration"), which attached a copy of the Corrected Findings of Fact and Conclusions of Law of the Settling Parties filed in Docket No. 2007-3 CRB CD 2004-05. The Kientzle Declaration and its attachment, which consist of more than 300 pages of supplemental briefing favorable to JSC, was not solicited by, or permitted under the June 29 Order. See June 29 Order at 1 (permitting only the filing of "affidavits from witnesses in this proceeding, solely for the purpose of clarifying evidence in the record, with citations to the record"). Accordingly, the Judges should not consider the Kientzle Declaration or its attachments in their deliberations.

suggest that the prior decisions of the CRT, the CARP, and the Librarian that predated the 1998-99 CARP Report were incorrect. Moreover, even if the Judges were to decide that the 1998-99 CARP Report and the 2004-2005 Cable Distribution Determination constitute controlling precedent regarding a PTV Basic Fund adjustment in the limited context of the Bortz Survey, the Judges are still not required to adopt the adjustment in this proceeding if they conclude that the prior determinations were incorrect. The D.C. Circuit has held that the Judges “are free to depart from precedent if they provide reasoned explanations for their departures.”¹⁵ Here, the record before the Judges does not support PTV’s requested Basic Fund share adjustment. Accordingly, Program Suppliers maintain their position that it would be inappropriate as a matter of law for the Judges to award PTV a Basic Fund share adjustment to account for its non-participation in the 3.75% and Syndex Funds, regardless of the methodology that the Judges ultimately choose to adopt in this proceeding.

II. The Record Evidence In This Proceeding Does Not Support An Upward Adjustment To PTV’s Basic Fund Share.

In its initial brief, PTV argued that the record in this proceeding supports an upward adjustment to PTV’s Basic Fund share to account for its non-participation in the 3.75% and Syndex Funds, regardless of the methodology adopted by the Judges.¹⁶ As support for this contention, PTV relies on the testimony of PTV’s witness Linda McLaughlin. PTV also provides an affidavit from Ms. McLaughlin as an attachment to its initial brief (“McLaughlin Affidavit”), in which she attempts to explain her rationale for awarding PTV a Basic Fund share adjustment and identify some record support for her arguments. However, tellingly, Ms.

¹⁵ See *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1014 (D.C. Cir. 2014); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 762 (D.C. Cir. 2009); see also *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 402 (D.C. Cir. 2005).

¹⁶ See PTV Initial Brief at 12-17.

McLaughlin's record citations which she argues support a PTV adjustment are derived from her own testimony, or based on the testimony of witnesses in prior royalty proceedings, and not on the testimony presented by any of the witnesses who actually presented royalty allocation methodologies to the Judges *in this proceeding*.¹⁷

As SDC pointed out in its initial brief, the record evidence in this proceeding does not support the Basic Fund share adjustments that have been proposed by Ms. McLaughlin, even in the context of the Bortz Survey.¹⁸ Moreover, as Program Suppliers' witnesses Dr. Gray and Mr. Horowitz clarified in the declarations attached to Program Suppliers' initial brief, neither Dr. Gray's viewing study (the "Gray Study") nor Mr. Horowitz's cable operator survey (the "Horowitz Survey") require an upward adjustment for PTV to account for its non-participation in the 3.75% and Syndex Funds. This is because the royalty shares presented in Gray Study and the Horowitz Survey were both intended to be applied to the Basic Fund, and then proportionately adjusted for the 3.75% Fund to account for PTV's non-participation in that fund.¹⁹ Moreover, both Dr. Gray and Mr. Horowitz confirmed that their methodologies were intended to measure the relative market value of the different programming categories at issue in this proceeding, and were not based on the regulated, statutory licensing formula.²⁰ Accordingly, Ms. McLaughlin's suggestion that the Gray Study and the Horowitz Survey were based on "Combined Royalty Funds"²¹ is simply inaccurate, and should not be accepted by the Judges.

¹⁷ McLaughlin Affidavit at 3, n.9; at 4, n.12; at 5, n.17; and at 5, n.18.

¹⁸ See SDC Initial Brief at 6-7 (explaining that the 2010-13 Bortz Survey, like prior Bortz surveys, did not attempt to determine relative value percentages based on gross royalties actually paid and pointing out the Mr. Trautman "expressed skepticism regarding the adjustments that PTV proposed"), and at 7-9 (discussing other methodologies).

¹⁹ See Gray Declaration at 2-5; Horowitz Declaration at 2-3.

²⁰ Gray Declaration at 1-2; Horowitz Declaration at 2.

²¹ McLaughlin Affidavit at 3-4, and at 5, n.18

III. All Parties Agree That Allocation Of The Remaining Syndex Fund Is Not In Controversy, And Must Be Awarded To Program Suppliers.

All parties agree that Program Suppliers are the only party remaining in this proceeding who are entitled to participate in the Syndex Fund. Therefore, allocation of the Syndex Fund royalties is not in controversy, and 100% of the royalties remaining in the Syndex Fund should be awarded to Program Suppliers. As several parties have observed, the Syndex Fund royalties are very small (approximately 0.01% of the total royalty funds collected by the Licensing Division for the 2010, 2011, 2012, and 2013 cable royalty years).²² Program Suppliers do not support any adjustment to any other parties' Basic or 3.75% Fund shares to account for their non-participation in the Syndex Fund.

IV. Conclusion

For all of the reasons set forth herein, the Judges should decline to award PTV a Basic Fund share adjustment, regardless of the methodology that the Judges ultimately adopt in this proceeding. Program Suppliers do not believe additional evidence of testimony is needed for the Judges to resolve this issue.

²² See SDC Initial Brief at 1, n.1; CCG Initial Brief at 6; JSC Initial Brief at 2, n.1; CTV Initial Brief at 11; PTV Initial Brief at 4.

Respectfully submitted,

/s/ Lucy Holmes Plovnick

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
Mitchell Silberberg & Knupp LLP
1818 N Street NW, 7th Floor
Washington, DC 20036
(202) 355-7917 (Telephone)
(202) 355-7887 (Facsimile)
goo@msk.com
lhp@msk.com
amd@msk.com

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*Attorneys for
Program Suppliers*

Proof of Delivery

I hereby certify that on Monday, July 30, 2018 I provided a true and correct copy of the Program Suppliers' Responsive Brief Pursuant To Order Soliciting Further Briefing to the following:

Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Joint Sports Claimants, represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

Devotional Claimants, represented by Michael A Warley served via Electronic Service at michael.warley@pillsburylaw.com

Commercial Television Claimants (CTC), represented by John Stewart served via Electronic Service at jstewart@crowell.com

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

Signed: /s/ Lucy H Plovnick